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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 346

WASHINGTON BREWERS INSTITUTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 174) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 13, 1943 (R. 185). The petition for a writ of certiorari was filed on September 13, 1943. The jurisdiction of this Court in invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Twenty-first Amendment and subsequently enacted state liquor control legislation none of which authorized concerted action to fix prices, bar prosecution under the Sherman Act of a conspiracy to fix prices in the interstate distribution of beer.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Section 2 of the Twenty-First Amendment to the Federal Constitution, which provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 1 of the Sherman Act (26 Stat. 209, 15 U. S. C. 1), which provides in part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The pertinent portions of statutes of California, Idaho, Oregon, and Washington, respectively, relating to the sale of beer in those states, are set forth in Appendix II of petitioners' brief.

STATEMENT

Petitioners were indicted for conspiring to fix the price of beer sold in interstate commerce in an area embracing the States of California, Idaho, Oregon, and Washington (R. 5).[1] Demurrers were filed in which petitioners contended that the Twenty-First Amendment deprived the Federal Government of all power independently to regulate interstate commerce in intoxicating beverages, and also that in those states where the Amendment had been followed by liquor control legislation, all federal legislation grounded upon the commerce clause was repealed to the extent that such legislation purported to regulate the conduct of the liquor industry (R. 38, 135). The demurrers were overruled (R. 52); pleas of *nolo contendere* were entered; and petitioners were fined various amounts (R. 56–133). Appeals to the Circuit Court of Appeals for the Ninth Circuit challenged only the sufficiency of the indictment to charge an

[1] The indictment also contained a count (R. 29) charging a conspiracy to fix the price of beer shipped to the Territory of Alaska in violation of Section 3 (38 Stat. 731, 15 U. S. C. 14) of the Sherman Act, but petitioners' contentions are primarily directed to the first count, in which the charge outlined above was made.

offense against the United States (R. 140–168).

The Circuit Court of Appeals affirmed the judgment of the district court (R. 174–184). It held that the Twenty-First Amendment "does not deprive the national government of all authority to legislate in respect of interstate commerce in intoxicants" (R. 178), and that, even though the Amendment might require the Sherman Act to yield to inconsistent state liquor legislation, the laws of none of the states in which the petitioners acted "sanction combinations among producers having as their purpose the fixing of uniform and artificial beer prices" (R. 181–182).

ARGUMENT

1. In *Jameson* v. *Morgenthau,* 307 U. S. 171, the claim that the Federal Alcohol Administration Act (49 Stat. 977, 1965, 27 U. S. C. 201 *et seq.*) was invalid because the Twenty-first Amendment gave the states "complete and exclusive control over commerce in intoxicating liquors" (p. 173), was held by this Court to be so lacking in substance that a three-judge court had no jurisdiction to hear it. The complaint there sought to enjoin the Secretary of the Treasury from enforcing labeling regulations issued pursuant to subsection (e) of Section 5 of that Act (27 U. S. C. 205 (e)) against a dealer seeking to release certain whiskey from customs. This subsection applied to "interstate or foreign com-

merce," and the suggestion made by the petitioners here that the views expressed in that case were limited to the validity of the Act as a regulation of foreign commerce ignores the indiscriminate treatment of interstate and foreign commerce embodied in the statute itself.[2] Neither the terms nor the history of the Twenty-first Amendment support the contention that it deprived Congress of all regulatory powers over intoxicating liquor in interstate commerce, and petitioners' argument in that respect is as insubstantial as that rejected in the *Jameson* case.

This Court has considered the effect of the Twenty-first Amendment on state legislation in a series of five cases beginning with *State Board* v. *Young's Market Co.*, 299 U. S. 59, and continuing through *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132.[3] In each case it has upheld the right of the states to control traffic in liquor within their borders in a manner consistent with the fullest exercise of their police powers, even though such regulation results in import or export restrictions which

[2] Section 5 of the Act (27 U. S. C. 205), which deals with unfair competition and unlawful practices, uses the phrase "in interstate or foreign commerce" to define offenses involving the use of exclusive outlets, tied houses, commercial bribery and consignment sales respectively dealt with in subsections (a), (b), (c) and (d), in addition to the labeling offenses dealt with in subsection (e).

[3] The others are *Mahoney* v. *Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co.* v. *Liquor Commission*, 305 U. S. 391, and *Finch & Co.* v. *McKittrick*, 305 U. S. 395.

might have been thought to violate the commerce clause of the Federal Constitution prior to the Twenty-first Amendment. None of these cases even suggests that the Twenty-first Amendment divested the Federal Government of all independent power to regulate interstate commerce in alcoholic beverages. In *Arrow Distilleries, Inc.* v. *Alexander,* 310 U. S. 646, this Court denied review of a judgment of the Seventh Circuit Court of Appeals, 109 F. (2d) 397, sustaining the validity of the Federal Alcohol Administration Act against the contention that the Amendment had such an effect.[4]

2. Petitioners (p. 5) cite seven cases in support of the proposition that "There exists a conflict between certain of the Circuit and District Courts, and confusion, with respect to the effect of the Twenty-first Amendment insofar as the power and authority of the State and Federal Governments are concerned." The decisions cited include the *Arrow* case, noted above, and are not in conflict either with each other or with the decision below. The two which construe the Sherman Act[5] sustain the application of the Act to commerce in liquor and beer, respectively. Two more which

[4] The petition in the *Arrow* case relied on this contention as a reason for granting the writ.

[5] *United States* v. *Colorado Wholesale, etc., Assn.*, 47 F. Supp. 160 (D. Colo.); *Schlitz Brewing Co.* v. *Johnson*, 123 F. (2d) 1016 (C. C. A. 6), affirming 33 F. Supp. 176 (E. D. Tenn.).

construe the effect of the Twenty-first Amendment on state legislation[6] do so in harmony with its construction by this Court. The remaining two[7] construe neither the Sherman Act nor the Twenty-first Amendment.

3. Petitioners' argument that the state liquor laws have overridden the Sherman Act is not supported by reference to any state laws which authorize combinations to establish liquor prices. The state statutes quoted in the appendix to the petition under the heading, "Price Control Provisions" (pp. 5A–13A) do not provide for the fixing of prices either by the state or by private interests. They merely require that contracts be filed and prices posted with the state regulatory authority, and that the prices charged by each brewer or beer importer shall be uniform for the same class of buyer within a particular area. Such statutes hardly justify a private combination to fix prices, particularly in view of anti-trust laws in each of the states, which are applicable to beer as well as to other commodities.[8] Petitioners claim that "the purpose of the state laws and regulations is to fix uni-

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[6] *Finch & Co.* v. *McKittrick*, 23 F. Supp. 244 (W. D. Mo.), affirmed, 305 U. S. 395; *Wylie* v. *State Board*, 21 F. Supp. 604 (S. D. Calif.).

[7] *Flippin* v. *United States*, 121 F. (2d) 742 (C. C. A. 10); *Zukaitis* v. *Fitzgerald*, 18 F. Supp. 1000 (W. D. Mich.).

[8] These laws are referred to in the opinion of the Circuit Court of Appeals (R. 182).

form prices" (Pet. p. 18). A reading of the statutes demonstrates plainly that their object was uniformity in the price charged by each brewer or importer, so as to prevent discrimination between customers purchasing his products. The statutes do not even remotely suggest that the elimination of price competition between competitors was to be authorized, or that uniformity of prices throughout the industry was the desideratum.

Petitioners suggest that the price-posting statutes command or encourage conduct which has been held to violate the Sherman Act in *Sugar Institute* v. *United States,* 297 U. S. 553. But that case was not concerned with the mere publication of price information (cf. *Maple Flooring Association* v. *United States,* 268 U. S. 563), nor with the compulsory furnishing of data to a state regulatory body (cf. *Parker* v. *Brown,* 317 U. S. 341). In any event, petitioners were not indicted for such conduct, nor for anything else sanctioned by the state laws.

4. Petitioners argument (pp. 22–26) that the indictment was insufficient because it failed to negative the existence of inconsistent state liquor laws is obviously without substance. *McKelvey* v. *United States,* 260 U. S. 353; *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.,* 205 U. S. 1, 10; *Javierre* v. *Central Altagracia,* 217 U. S. 502, 508, and cases cited. Such an issue,

alone, would not, in any event, warrant review by this Court.

CONCLUSION

The decision below is not in conflict with any decision of this Court or with any decision cited in the petition. The fundamental constitutional question presented has already been held to be without substance in the *Jameson* case. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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